Trujillo v. Apple Computer, Inc. et al Doc. 107

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, individually and on behalf of all others similarly situated,	)	No. 07 CV 04946
Plaintiff,	)	Judge Kennelly
	)	Mag. Judge Ashman
v.	)	
APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation,	)	
Defendants.	)	

PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSE TO DEFENDANT AT&T MOBILITY LLC'S SECOND AND THIRD SUPPLEMENTAL BRIEFS IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND DISMISS

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NOW COMES the Plaintiff, JOSE TRUJILLO, on behalf of himself and all others similarly situated, by and through his attorneys, LARRY D. DRURY, LTD., and in response to Defendant AT&T Mobility LLC's Second and Third Supplemental Briefs in Support of Its Motion to Compel Arbitration and Dismiss*,* states as follows:

INTRODUCTION

In response to the question posed by this Court in its April 18, 2008 Memorandum Opinion and Order (hereinafter "Order"), i.e., whether or not the terms of Defendant AT&T Mobility LLC's (hereinafter "Defendant") Terms of Service, arbitration agreement, and its restocking-fee waiver were provided to Plaintiff prior to his purchase of the Apple iPhone, Defendant has unequivocally answered that **they were not**. Nonetheless, Defendant argues that its arbitration agreement is not unconscionable despite the fact that it is a contract of adhesion which is not available to the Plaintiff until after he purchased the iPhone and subjected himself to the Apple restocking fee, unless of course Plaintiff were to conduct a futile internet-wide search to locate the arbitration agreement. Such a search would be futile because, as Defendant concedes:

> " [A] user who searched for 'terms of service' or a similar formulation on ATTM's web site in July 2007 would have located a version of the terms of service that had last been revised in February, 2006. The February 2006 terms contained an earlier version of ATTM's arbitration provision than the one at issue here." *See* p. 2, Fn.2 of Defendant's Second Supplemental Brief in support of its Motion to Compel Arbitration and Dismiss (hereinafter "Second Brief").

Therefore, even if Plaintiff would have a purported duty to search for and locate an arbitration agreement, which Plaintiff submits he should not, in the case at bar his search would have uncovered an arbitration agreement that does not apply to him. Further, although Defendant goes to great lengths on its website to provide links to its newest telephones, it noticeably omits any link to the most important of items, i.e., terms of service, arbitration agreement, etc., and requires the consumer to use the 'search' function if ever he should require such information.

Of course, this revelation is contrary to the argument Defendant first advanced in its initial Motion to Compel wherein Neil Berinhout, Associate General Counsel to Defendant, by way of a Declaration based upon his "personal knowledge", indicated that "[t]he ATTM Terms of Service booklet, which contains the terms and conditions of wireless service, is also available in the store...". *See* ¶9 of the October 16, 2007 Declaration of Neal Berinhout, hereinafter referred to as Berinhout Declaration I. However, as this Court is now fully aware, that statement was not true, had no basis in fact, and was made without an appropriate investigation of the facts. On May 5, 2008 Berinhout stated in a second Declaration that in fact the store where Plaintiff purchased his iPhone "does not keep ATTM's Terms of Service booklet in stock." *See* ¶3 of the May 5, 2008 Second Supplemental Declaration of Neal Berinhout, hereinafter referred to as Berinhout Declaration II. Berinhout's ninth-inning attempt to explain this contradiction, *vis a vis* Defendant's Third Supplemental Brief, is rather curious, pure folly, and falls flat.

In its Third Supplemental Brief (hereinafter "Third Brief"), Defendant attempts to confuse the issue by arguing that because an alleged family member of Plaintiff previously may have received a copy of Defendant's Terms of Service nearly two years prior to Plaintiff's purchase of the iPhone, Plaintiff "had the opportunity to learn about ATTM's terms of service and its arbitration provision from Dawn Marie Trujillo's experiences as an account holder." *See* p.4 of Defendant's Third Brief. **The fact is that Plaintiff purchased the iPhone that is the subject of this litigation from an Apple retail store, and "a customer who purchases an iPhone from an Apple retail store does not obtain ATTM's terms of service in the store."** *See* ¶11 of Neil Berinhout's Third Declaration (hereinafter "Berinhout Declaration III")(emphasis added). In support of its Third Brief, the purpose of which was supposed to be to explain the glaring contradiction between Berinhout Declaration I and Berinhout Declaration II, Defendant attaches additional woefully inadequate, speculative, and conclusory affidavits riddled with hearsay statements and documents that should not be considered by this court and in fact should likely be stricken[1]. The Berinhout Declaration III claims to be (again) based on "personal knowledge", but indicates that much of it is based on the investigation of "our lawyers" who Berinhout fails to identify in his Third Declaration. *See* ¶ 10 of Berinhout Declaration III. The declaration of Diane Bonina, in-house counsel for Defendant, is replete with hearsay and relies wholly on documents that lack foundation, i.e., they refer to account notes of phone calls received by Defendant on an AT&T telephone account. *See* ¶¶ 3,8, 12, 14-19, 23-25, 27-28 of Declaration of Diane Bonina. Plaintiff finds it hard to believe that in-house counsel for Defendant would include answering customer service calls among her job duties. Finally, Ramoncito Balce, a Store Manager employed by Defendant, also claims that his declaration is based upon "personal knowledge"; nonetheless, the entirety of his declaration states that his knowledge is "according to ATTM's records", for which there is no foundation. *See* ¶¶3, 5-10 of Declaration of Ramoncito Balce. In fact, other than the paragraphs in which he states his name and his employer, no other information is or possibly could be based upon his personal knowledge. Further, although the majority of Defendant's Third Brief is dedicated to explaining that its inconsistent affidavits were based upon its erroneous belief that Plaintiff had purchased his iPhone from an AT&T store, Defendant had notice as early as September 6, 2007 where Plaintiff alleged in his First Amended Complaint that his iPhone was purchased "from an Apple retail store located in Oakbrook, Illinois..." *See* ¶8 of First Amended Complaint. Defendant's obvious end-run around the facts, and bombardment of affidavits and after-the-fact apologies, will provide them with no solace or shelter from their conduct.

Defendant attempts to resuscitate its case by arguing what is essentially a motion to reconsider within its Brief where it states that "[a]lthough this Court has stated it does not find *Bess* or *Hill* 'dispositive of the present case' we respectfully submit that the Court has overlooked several reasons why they are." *See* p.3 of Defendant's Brief. In this Court's Order, the Court correctly held that neither *Bess* nor *Hill* were dispositive of the present case. This Court's reasoning for ruling as it did was based, in part, on the fact that nothing in the AT&T Mobility agreement told Plaintiff that he could return his iPhone to Apple without incurring the restocking fee. This Court then granted Defendant a final volley, its Second Brief, to show that Plaintiff was so informed. However, in its Second Brief, the restocking fee for which this Court requested clarification, is addressed by the Defendant as merely a "red herring." Noticeably absent from both their Second and Third Briefs is any proof that in fact some "restocking fee waiver" did ever exist and that said policy was provided to the Plaintiff.

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[1] Each Declaration that Defendant attaches in support of its Brief suffers from the same lack of factual support needed for a declaration, i.e., they are speculative, are based upon hearsay and hearsay within hearsay, lack foundation, and contain no business records qualification pursuant to F.R.C.P. 803. For these reasons, this Court should strike the entirety of Defendant's declarations.

For these same reasons, the Defendant's reliance on *Weinstein v. AT&T Mobility Corp.* 2008 WL 1914754 (E.D.Pa.) as supplemental authority in support of its Motion is misplaced. *Weinstein* is factually distinguishable from the case at bar on the issues upon which this Court has sought clarification and will ultimately base its ruling. This Court need look no further than the second sentence of that opinion to distinguish *Weinstein* wherein it states:

> "The service agreement signed by Plaintiff expressly incorporated and included by reference a "Terms of Service" booklet, **which Plaintiff also received at this time**." *Id.* at 1 (emphasis added).

Although in *Weinstein* the plaintiff received his Terms of Service at the time he purchased his phone and signed up for cellular phone service, we now know that the Plaintiff here did not. Where this Court has determined such a fact is "a critical factor in determining the issue of procedural unconscionability", *Weinstein* should not be relied upon. *See* Order, p.5.

To adopt Defendant's position in this case would be to first presume that consumers know what an arbitration agreement is, and would then require every potential consumer, prior to purchasing an item, to conduct their own search to determine whether or not such a purchase may subject them to an arbitration provision or some other unconscionable term of a contract, even though the retailer is in a much better position (and in this case, the only position) to fairly and accurately give notice of such terms prior to the time of purchase. In the case at bar, Defendant has admitted that (1) its Terms of Service were not made available to the Plaintiff in the store prior to his purchase of the iPhone, thus subjecting Plaintiff to the restocking fee should he not agree to AT&T's terms; (2) that the arbitration agreement he allegedly could have located online prior to his purchase was an old version that does not apply to Plaintiff, the iPhone, or the transaction at issue; and (3) that the alleged restocking-fee waiver, if even it does exist, was never provided to the Plaintiff. Whether or not Defendant's service agreement was available to Plaintiff prior to his purchase of the iPhone is a critical factor in determining the issue of procedural unconscionability in this case. *Razor v. Hyundai Motor Am.,* 222 Ill.2d 75, 100-01 (2006). Because Defendant has now indicated that these crucial terms were not so provided, this Court should find Defendant's arbitration agreement unconscionable and thus unenforceable.

WHEREFORE, Plaintiff prays that this Court deny Defendant's Motion and grant such further relief as this Court deems appropriate, including but not limited to an evidentiary hearing on Defendant's affidavits.

Jose Trujillo, individually and on
behalf of all others similarly situated,

Dated: June 2, 2008

By: /s/ James Rowe

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